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No. 15-7250

In the Supreme Court of the United States

MARCELO MANRIQUE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ALLON KEDEM
Assistant to the Solicitor General
SANGITA K. RAO
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a notice of appeal from a sentencing judgment that defers restitution is effective to challenge a later-issued restitution award.

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OPINION BELOW

The opinion of the court of appeals (J.A. 78-85) is not published in the *Federal Reporter* but is reprinted at 618 Fed. Appx. 579.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2015. A petition for rehearing was denied on September 11, 2015 (J.A. 86-87). The petition for a writ of certiorari was filed on December 2, 2015, and the petition was granted on April 25, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

The pertinent statutory provisions and rules are reproduced in the appendix to this brief. App., *infra*, 1a-17a.

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of possessing a visual depiction of a minor engaging in sexually explicit conduct, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). J.A. 31. The district court entered a judgment sentencing petitioner to 72 months of imprisonment and a life term of supervised release. J.A. 32-33. Following a restitution hearing, J.A. 45, the court issued an amended judgment ordering restitution in the amount of $4500. J.A. 74. The court of appeals affirmed the original judgment and dismissed for lack of jurisdiction petitioner's challenge to restitution. J.A. 78-85.

1. In January 2014, a child pornography investigation led federal agents to petitioner's residence in Miami, Florida. Petitioner admitted to downloading child pornography onto his desktop computer. Petitioner consented to a search of his computer, which revealed more than 300 files containing visual depictions of children engaged in sexually explicit conduct. J.A. 22-23; see J.A. 18 (videos involving children who appeared to be less than six years old).

a. Petitioner pleaded guilty to one count of possessing a visual depiction of a minor engaging in sexually explicit conduct. J.A. 78-79. At a sentencing hearing conducted on June 23, 2014, the district court imposed a 72-month term of imprisonment and a life term of supervised release. It also ordered petitioner to pay a special assessment of $100. J.A. 26-28. The court acknowledged that restitution was "mandatory" but stated that the victims' losses had not yet been ascertained; it accordingly scheduled a hearing, to be

held in two months' time, at which the victims' losses would be determined. J.A. 27.

The district court's judgment was entered on the docket the next day, June 24, 2014. J.A. 4. The judgment memorialized the imprisonment, supervised release, and special assessment aspects of petitioner's sentence, J.A. 31-41, but listed the amount of restitution as "$0.00," J.A. 39. It also stated that the "determination of restitution [wa]s deferred" and that an amended judgment would be entered "after such determination." *Ibid.*

On July 8, 2014, petitioner filed a notice of appeal "from the final judgment and sentence entered in this action on the 24th day of June, 2014." J.A. 42. Also on July 8, the district court transmitted the notice of appeal and docket sheet to the court of appeals. J.A. 4-5. The next day, the court of appeals acknowledged receipt of the notice of appeal, and petitioner's appeal was given an appellate case number. J.A. 5.

b. The district court held petitioner's restitution hearing, after rescheduling, on September 17, 2014. J.A. 5-6. The prosecutor informed the court that only one of the victims, known by the pseudonym "Angela," sought restitution. J.A. 48. Petitioner had possessed 45 images of Angela, some of which depicted her at three or four years old being forced to perform oral sex on her father. J.A. 49, 58, 60. Angela's attorney submitted materials under seal—including a letter, affidavit, psychological evaluation, and victim impact statement—explaining the physical and mental trauma that Angela had endured, both from the initial abuse and from the later distribution of the images. J.A. 48-50, 55, 59-60; see J.A. 52 (psychological evaluation explaining that "the fact that these images are

out there is continuing to harm her"). The materials also described her associated treatment and legal costs, including "detailed accounts of what [Angela] is going to need to pay over the course of her life to overcome what happened." J.A. 59; see J.A. 50, 53-55, 59-60. Angela sought $11,980 to $16,400 in restitution to compensate for damage that petitioner's actions had "proximate[ly] cause[d]." J.A. 49.

In response, petitioner argued that Angela was entitled to "Zero" based on the government's failure to prove a causal relationship between his conduct and the harm to Angela. J.A. 54. The district court rejected that argument. The court acknowledged the difficulty of "comput[ing] what the compensation should be" but believed it appropriate to use "God-given common sense." J.A. 58. Relying on evidence that the cost of Angela's treatment ranged from $85 to $200 per therapy session, the court concluded that restitution in the amount of $100 per image was "reasonable." J.A. 62; see J.A. 60-62. Based on the 45 images of Angela on petitioner's computer, the court orally ordered petitioner to pay Angela $4500 in restitution. J.A. 62. The court then asked petitioner if he wished to make a statement but cautioned petitioner to be careful in what he said because "your attorney * * * may or may not appeal this." *Ibid.*

On September 18, 2014, the day after the hearing, the district court entered an amended judgment, which added the order of restitution to petitioner's original sentence. J.A. 66-77. The amended judgment required petitioner to pay $4500 in restitution and specified the manner in which payments were to be made. J.A. 74-75. Petitioner did not file a notice of

appeal from the court's oral order imposing restitution, nor from the amended judgment.

2. On appeal, petitioner challenged his life term of supervised release and the restitution order. J.A. 78. As to restitution, petitioner argued that the government had not shown that he was the proximate cause of Angela's damages and had not substantiated the amount of damages. Pet. C.A. Br. 23-29. In response, the government argued that petitioner had waived his right to challenge restitution by failing to file a notice of appeal from the district court's oral ruling or from the amended judgment. Gov't C.A. Br. 22-25. The government also argued that the restitution order was proper. *Id.* at 25-32.

The court of appeals affirmed petitioner's life term of supervised release and dismissed his challenge to restitution. J.A. 78-85. The court described "the filing of a timely notice of appeal" from a district court decision as necessary to confer appellate "jurisdiction to review the decision on the merits." J.A. 83. Accordingly, "because [petitioner] did not file a notice of appeal designating the amended judgment setting forth the restitution amount," the court of appeals explained, "[w]e do not have jurisdiction to entertain [his] challenge to his restitution amount." J.A. 85. The court also rejected petitioner's argument that his notice of appeal from the original sentence had "ripened following the entry of the amended judgment." *Ibid.* In order to challenge the restitution order, the court stated, petitioner "was required to either appeal both the original judgment and the amended judgment, or appeal the amended judgment only." *Ibid.* Since petitioner had done neither, the court dismissed

"for lack of jurisdiction" petitioner's challenge to restitution. *Ibid.*

SUMMARY OF ARGUMENT

A criminal defendant may obtain appellate review of his sentence only by filing a notice of appeal after the sentence has been imposed. Petitioner failed to notice an appeal from the district court's award of restitution, and contrary to petitioner's argument, the Federal Rules do not legitimize or excuse that failure.

A. Congress gave the courts of appeals limited jurisdiction to review the sentence of a defendant who "file[s] a notice of appeal in the district court for review of * * * the sentence." 18 U.S.C. 3742(a); see Fed. R. App. P. 3(a)(1) (appellate review may be obtained "only by filing a notice of appeal"). Petitioner did not file a notice of appeal following the district court's award of restitution in September 2014 and so may not challenge the amount of restitution on appeal. Although petitioner did file a notice of appeal in July, following the original judgment imposed by the court, that judgment deferred restitution for resolution at a later date. See J.A. 39 ("determination of restitution is deferred"). Accordingly, petitioner's appeal from the original judgment was not effective to challenge the court's later award of restitution.

B. Petitioner's primary argument (Br. 22) is that, under Federal Rule of Appellate Procedure 4(b)(2), his prematurely filed notice of appeal "mature[d] and spr[ang] forward" following the district court's later award of restitution. That argument contradicts the text of Rule 4(b)(2), which applies only where a notice of appeal is filed "*after* the court announces a decision, sentence, or order" that the defendant wishes to appeal, but before the decision is formally entered on the

docket. But petitioner's notice of appeal was filed more than two months *before* the district court awarded $4500 in restitution, which is the decision he wishes to challenge on appeal.

Petitioner's argument also contravenes the purpose of Rule 4(b)(2), which protects a defendant who reasonably but mistakenly believes that the announcement of a decision is itself a final, appealable judgment. The judgment from which petitioner noticed his appeal listed the amount of restitution as "$0.00" and stated that the issue of restitution was "deferred." J.A. 39. A reasonable defendant would not interpret that as a final, appealable judgment with respect to restitution; nor would petitioner have had grounds at that time to object to the as-yet-undetermined *amount* of restitution. Petitioner's interpretation of Rule 4(b)(2) would also create practical and conceptual difficulties in some deferred-restitution cases and could interfere with the government's opportunity to cross-appeal in other cases.

C. In the alternative, petitioner argues that his failure to file a notice of appeal should be forgiven as "harmless error" under Federal Rule of Criminal Procedure 52(a) unless the government can prove prejudice. But that rule allows a court of appeals to excuse an "error" in the district court proceedings. It does not apply where, as here, a litigant simply fails to take the steps necessary to create appellate jurisdiction. Finally, even if the notice of appeal requirement were merely a mandatory-claim-processing rule—rather than a jurisdictional prerequisite to appellate review—the requirement must be given effect in this case because the government properly invoked it in the court of appeals.

ARGUMENT

THE COURT OF APPEALS LACKED JURISDICTION TO REVIEW THE DISTRICT COURT'S AWARD OF RESTITUTION BECAUSE PETITIONER FAILED TO FILE A NOTICE OF APPEAL FROM THAT DECISION

A. To Appeal A Criminal Sentence, The Defendant Must File A Notice Of Appeal Following The Order Or Judgment Sought To Be Appealed

"The right of appeal, as we presently know it in criminal cases, is purely a creature of statute." *Abney* v. *United States*, 431 U.S. 651, 656 (1977). Congress has specified the appropriate—and only—means for a defendant to appeal a criminal sentence: The defendant must "file a notice of appeal in the district court for review of * * * the sentence." 18 U.S.C. 3742(a). Because petitioner failed to file a notice of appeal following the district court's award of restitution, he may not challenge restitution on appeal.

1. Federal sentencing appeals have, historically, been strictly circumscribed. Before the Sentencing Guidelines system, a district court would exercise its discretion to choose a criminal sentence within statutory limits; once it did so, that sentence "was, for all practical purposes, not reviewable on appeal." *Koon* v. *United States*, 518 U.S. 81, 96 (1996). In 1984, Congress revised its approach to appellate review of sentencing by creating appellate jurisdiction "for review of an otherwise final sentence" in specified circumstances. Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, § 213(a), 98 Stat. 2011. The current provision, Section 3742, now provides "limited appellate jurisdiction to review federal sentences." *Koon*, 518 U.S. at 96; see *United States* v. *Ruiz*, 536 U.S. 622, 628 (2002) (Section 3742 describes

the circumstances in which "appellate jurisdiction [i]s proper").

Section 3742 specifies both the categories of sentencing errors that may be appealed and the means by which appellate review may be obtained. As relevant here, a criminal defendant who seeks "review of an otherwise final sentence [that] was imposed in violation of law" must "file a notice of appeal in the district court." 18 U.S.C. 3742(a)(1). The Federal Rules impose a similar requirement, providing that a timely notice of appeal is the "only" route by which "[a]n appeal permitted by law as of right from a district court to a court of appeals may be taken." Fed. R. App. P 3(a)(1). Once filed, the notice of appeal "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam). It also triggers many of the procedural steps that facilitate appellate review, including service of the notice on opposing counsel and on the defendant, Fed. R. App. P. 3(d); payment of any appellate docketing fees, Fed. R. App. P. 3(e); compilation of the record on appeal, see Fed. R. App. P. 10(a), (b)(1), and (3); and docketing of the case in the court of appeals, see Fed. R. App. P. 12(a).

In specifying that a criminal sentence may be challenged only through the filing of a notice of appeal, Section 3742 and the Federal Rules reflect an "unwritten but longstanding" legal principle: that "an appellate court may not alter a judgment to benefit a nonappealing party." *Greenlaw* v. *United States*, 554 U.S. 237, 244 (2008). That principle, which dates from the earliest days of the federal judiciary, see *McDonough*

v. *Dannery*, 3 U.S. (3 Dall.) 188, 198 (1796), serves "the interests of the parties and the legal system in fair notice and finality." *Greenlaw*, 554 U.S. at 252. This Court has accordingly declined on numerous occasions to permit "an appeals court [to] modify a judgment in favor of a party who filed no notice of appeal." *Id.* at 253; see, *e.g.*, *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 479 (1999); *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 314-318 (1988); see also *Greenlaw*, 554 U.S. at 245 (calling the rule "inveterate and certain" when applied to cross-appeals, but reserving judgment as to whether the rule is jurisdictional in that context) (citation omitted); cf. *Bolles* v. *Outing Co.*, 175 U.S. 262, 268 (1899) (litigant "did not take out a writ of error, and cannot now be heard to complain of any adverse rulings in the court below").

To be effective, a notice of appeal must be filed *after* the sentence intended to be appealed, not before it. That commonsense rule follows directly from Section 3742, which authorizes the defendant to file a notice of appeal to challenge a sentence that "*was imposed* in violation of law." 18 U.S.C. 3742(a)(1) (emphasis added); see *Carr* v. *United States*, 560 U.S. 438, 447-448 (2010) (ascribing "significance" to Congress's choice of verb tense). The Federal Rule that specifies the content of the notice of appeal also requires the appealing party to "designate the judgment, order, or part thereof being appealed," Fed. R. App. P. 3(c)(1)(B), a requirement that logically cannot be satisfied until the district court has issued the judgment or order sought to be appealed. And the deadline for a defendant to file a notice of appeal in a criminal case is "within 14 days *after*" the district court's "entry of either the judgment or the order

being appealed." Fed. R. App. P. 4(b)(1)(A)(i) (emphasis added). Putting the horse (the sentence) before the cart (the notice of appeal) helps prevent unnecessary and frivolous appeals: A defendant must know his sentence before he can evaluate the potential risks and benefits of appealing it—indeed, before he can determine whether a valid legal basis for appeal even exists.

2. The Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A (§§ 201 *et seq.*), 110 Stat. 1227, specifies procedures for awarding restitution as a mandatory component of the sentence for certain criminal offenses, 18 U.S.C. 3663A, including offenses involving the sexual exploitation and abuse of children, 18 U.S.C. 2259(a). The MVRA requires prosecutors to identify victims and determine the amount of their losses before sentencing, 18 U.S.C. 3664(d)(1), but it also acknowledges that "the victim's losses [may] not [be] ascertainable" at that time. 18 U.S.C. 3664(d)(5). In those cases, "the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." *Ibid.*

Where victims' losses are not ascertainable before sentencing, the district court will often issue an initial judgment that includes other aspects of the defendant's sentence (such as a term of imprisonment) but defers the issue of restitution for later resolution. Such a deferred-restitution scenario was presented in *Dolan* v. *United States*, 560 U.S. 605 (2010). There, the defendant was sentenced to terms of imprisonment and supervised release, but the issue of restitution was left "open" in light of "insufficient information on the record at th[at] time." *Id.* at 608 (cita-

tion omitted). The court accordingly entered an initial judgment that included the defendant's sentence, *ibid.*, but also scheduled a restitution hearing for a later date—albeit a date well past the 90-day deadline established by statute. *Id.* at 609. After the restitution hearing, the court imposed a new sentence that included an order of restitution. *Ibid.*

The question in *Dolan* was whether the district court's tardiness in holding the restitution hearing had affected its power to award restitution. In considering that question, this Court addressed the defendant's argument that a long time-gap between the initial judgment and the order of restitution might prejudicially "delay the defendant's ability to appeal" his prison sentence. 560 U.S. at 616. The Court disagreed, declining to accept the defendant's "premise, *i.e.*, that a sentencing judgment is not 'final'"—and hence, not appealable—"until it contains a definitive determination of the amount of restitution." *Id.* at 617. "To the contrary," the Court observed, "strong arguments favor the appealability of the initial judgment irrespective of the delay in determining the restitution amount." *Ibid.* The Court pointed to statutes indicating that a "judgment of conviction" that includes a sentence of imprisonment, supervised release, or a fine is a "final judgment," even if the amount of restitution has yet to be determined. *Id.* at 617-618 (quoting 18 U.S.C. 3582(b) (imprisonment) and citing 18 U.S.C. 3583(a) (supervised release) and 18 U.S.C. 3572(c) (fine)).

Particularly notable for present purposes, the Court also addressed what a defendant must do to appeal both the initial judgment and the later order of restitution:

> [Section] 3664(*o*) provides that a "sentence that imposes an order of restitution," such as the later restitution order here, "is a final judgment." Thus, it is not surprising to find instances where a defendant has appealed from the entry of a judgment containing an initial sentence that includes a term of imprisonment; that same defendant has subsequently appealed from a later order setting forth the final amount of restitution; and the Court of Appeals has consolidated the two appeals and decided them together.

Dolan, 560 U.S. at 618.

The discussion in *Dolan* strongly indicates the appropriate procedure for obtaining appellate review of the entire criminal sentence in a deferred-restitution scenario (although it did not definitively resolve the issue, see 560 U.S. at 618). An initial sentence that includes a term of imprisonment, supervised release, or a fine "is a 'final judgment,'" *id.* at 617 (quoting 18 U.S.C. 3582(b)), from which "the defendant can appeal" by filing a notice of appeal, *id.* at 618. Similarly, a later award of restitution "is a final judgment," from which the defendant may separately notice an appeal. *Ibid.* (quoting 18 U.S.C. 3664(*o*)). Therefore, if the defendant in a deferred-restitution case "has appealed from the entry of a judgment containing an initial sentence" but also wishes to appeal a later restitution order, that defendant should "subsequently appeal[] from [the] later order setting forth the final amount of restitution." *Ibid.* When the defendant does so, "the Court of Appeals [may] consoli-

date[] the two appeals and decide[] them together." *Ibid.*[1]

3. Petitioner did not follow that procedure. Although he appealed from the district court's initial judgment, entered on June 24, 2014, that judgment did not contain an order of restitution. Rather, it stated that "determination of restitution is deferred." J.A. 39. Petitioner then filed a notice of appeal that indicated his intent to appeal "from the final judgment and sentence entered in this action on the 24th day of June, 2014." J.A. 42. The sentence entered on that date was thus an "otherwise final sentence" that petitioner, by means of his notice of appeal, challenged on the ground that it "*was imposed* in violation of law." 18 U.S.C. 3742(a)(1) (emphasis added). Petitioner did not, however, appeal from the court's later oral order of $4500 of restitution, J.A. 62, nor did he appeal from the amended judgment that incorporated restitution in that amount into his sentence, J.A. 74-75. Because petitioner failed to do so, jurisdiction was never "confer[red] * * * on the court of appeals * * * over th[at] aspect[] of the case." *Griggs*, 459 U.S. at 58.

In response, petitioner notes (Br. 35) that the district court described restitution as "mandatory" at the original sentencing hearing, and he asserts (*ibid.*) that the court's statement had the effect of "includ[ing] restitution in the sentence from the very first." That

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[1] Following *Dolan*, every court of appeals to consider the issue has held that an initial judgment imposing a sentence but deferring determination of restitution is "final for purposes of appeal." *United States* v. *Muzio*, 757 F.3d 1243, 1250 n.8 (11th Cir.), cert. denied, 135 S. Ct. 395 (2014); see *United States* v. *Tulsiram*, 815 F.3d 114, 117-119 (2d Cir. 2016) (per curiam); *United States* v. *Gilbert*, 807 F.3d 1197, 1199-1200 (9th Cir. 2015).

is incorrect. At the sentencing hearing, the court accurately stated a general legal principle applicable to child pornography cases—that "restitution is mandatory," J.A. 27—but it did not award any restitution at that time. Petitioner similarly errs when he claims (Br. 36) that his "original notice of appeal captured that portion of the [initial] judgment involving restitution and the language in that original judgment relating to a future amended judgment." No "portion" of the initial judgment included restitution. See J.A. 39 ("$0.00"). To the contrary, the initial judgment, by stating that "determination of restitution is deferred," *ibid.*, indicated that the court was *declining* at that time to consider or resolve the proper amount of restitution.

This case also clearly illustrates the wisdom of requiring a notice of appeal to follow imposition of the sentence sought to be appealed. At the sentencing hearing, petitioner did not object to the district court's statement that restitution would be mandatory; indeed, he could not have objected, as he had just pleaded guilty to an offense for which restitution is required by statute. See 18 U.S.C. 2259(a) ("[T]he court shall order restitution for any offense under this chapter."). Thus, petitioner would have had no basis to challenge the court's statement as being "in violation of law," 18 U.S.C. 3742(a)(1), even if such a general statement were somehow appealable. Nor would petitioner have had grounds at that time to object to the *amount* of restitution, as no amount had yet been determined. It was only months later, after the restitution hearing at which the court concluded that petitioner was the proximate cause of $4500 of Angela's losses, that the concrete basis for possible appeal of

restitution emerged. Therefore, petitioner's "only" option for appealing the amount of restitution, Fed. R. App. P. 3(a)(1), was to file a notice of appeal after that amount had been determined.

B. Federal Rule Of Appellate Procedure 4(b)(2) Does Not Excuse Petitioner's Failure To Appeal From The Award Of Restitution

Petitioner acknowledges (Br. 20) that his notice of appeal from the district court's initial judgment was "premature" as a means of challenging restitution. He nevertheless argues (*ibid.*) that his notice of appeal was "activate[d]" under Federal Rule of Appellate Procedure 4(b)(2) when, more than two months later, the court ordered him to pay $4500 in restitution. But that rule, by its own plain text, applies in circumstances far different from this case.

1. Although criminal defendants must normally file a notice of appeal "within 14 days *after* * * * the entry of either the judgment or the order being appealed," Fed. R. App. P. 4(b)(1)(A)(i) (emphasis added), Rule 4(b)(2) creates a limited exception in the following scenario:

> A notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

This exception recognizes that a district court's directives are not always formally noted on the docket immediately after they are announced. See Fed. R. App. P. 4(b)(6) (defining entry of a judgment or order to mean "when it is entered on the criminal docket"). If a defendant files a notice of appeal in the interim—*i.e.*, "after" the announcement of a decision but

"before" its formal entry on the docket—then the notice will be "treated as filed on the date of and after the entry."

That rule makes sense because, when a docket entry merely memorializes a decision that has already been announced, the entry is "only a ministerial act." *United States* v. *F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 233 (1958); see *ibid.* ("[T]he clerk's notation in the civil docket * * * sets forth no more substance than is contained or directed in the opinion.") (internal quotation marks omitted). As this Court has explained in construing Rule 4(a)(2), the nearly identically worded civil counterpart to Rule 4(b)(2), this procedure "was intended to protect the unskilled litigant who files a notice of appeal from a decision that he reasonably but mistakenly believes to be a final judgment, while failing to file a notice of appeal from the actual final judgment." *FirsTier Mortg. Co.* v. *Investors Mortg. Ins. Co.*, 498 U.S. 269, 276 (1991). The rule applies "only when a district court announces a decision that *would be* appealable if immediately followed by the entry of judgment," because in that scenario, a litigant might "reasonably but mistakenly believe[the announcement] to be a final judgment," and "[l]ittle would be accomplished by prohibiting the court of appeals from reaching the merits of such an appeal." *Ibid.*

The circumstances under which Rule 4(b)(2) applies are illustrated by *Lemke* v. *United States*, 346 U.S. 325 (1953) (per curiam). There, the district judge pronounced the defendant's sentence on March 10, 1952, and the defendant filed a notice of appeal the next day. "The judgment, however, was not entered until March 14," and so the court of appeals dismissed

the defendant's appeal as premature. *Id.* at 326. This Court reversed. The Court acknowledged that the defendant had not complied with the then-applicable timeline for appealing but concluded that his error should be disregarded. *Ibid.* A new federal rule was adopted in 1966 to address the *Lemke* scenario, see Fed. R. Crim. P. 37, Notes of Advisory Committee on Rules (1966 amendment) (18 U.S.C. App. at 712 (Supp. II 1967)), and its language has now been incorporated into Rule 4(b)(2). See 16A Charles Alan Wright et al., *Federal Practice and Procedure* § 3950.11 (4th ed. 2008 & Supp. 2016) (Wright & Miller).

Rule 4(b)(2) offers petitioner no help, however. Petitioner filed his notice of appeal in July, more than two months *before* the district court "announce[d the] decision, sentence, or order" that he wished to appeal. During the interim, the court held a restitution hearing at which it heard evidence and argument and determined that petitioner should pay $4500 in restitution. That decision—the very decision petitioner seeks to appeal—can hardly be described as a "ministerial act," akin to entering a previously announced order onto the docket. Put another way, it "would *not* be reasonable" for a litigant to think that a district court's statement that it intends to address restitution in the future "is a final judgment" with respect to restitution. *FirsTier Mortg.*, 498 U.S. at 276; see *Dolan*, 560 U.S. at 617 (a judgment must "be freighted with sufficiently substantial indicia of finality to support an appeal") (citation and internal quotation marks omitted).[2]

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[2] Petitioner incorrectly asserts (Br. 23) that the Restatement of Judgments supports treating a judgment "announcing restitution, but not specifying it" as a final, appealable order. The provision he

2. Petitioner nevertheless offers a multi-step argument as to why Rule 4(b)(2) should apply to his notice of appeal.

- *First*, that the "operative point of time" referred to by the rule "is entry of the 'judgment.'" Pet. Br. 20.
- *Second*, that in a deferred-restitution scenario, "'the judgment' is a combination of the initial judgment and sentence * * * and the later-filed amended judgment." *Ibid.*
- *Third*, that "a notice of appeal filed after sentencing (or even after the initial judgment) is filed 'after the court announces a decision, sentence or order—but before the entry of the judgment' specified in Rule 4(b)(2). As a result, the notice of appeal matures and springs forward to perfect appeal of 'the judgment,' which by then includes the later-filed amended judgment specifying the amount of restitution." Pet. Br. 22 (quoting Rule 4(b)(2)).

Petitioner's argument fails at each step.

First, Rule 4(b)(2) does not refer to a single "operative point of time," but rather to two: (1) the point "after the court announces a decision, sentence, or order," and (2) the point "before the entry of the judgment or order." To benefit from Rule 4(b)(2), a defendant must file his notice of appeal in between

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cites, Restatement (Second) of Judgments § 13 cmt. b (1982), merely observes that "finality for appellate review is [not] the same as finality for purposes of res judicata," and it provides as an example an "interlocutory appeal * * * under 28 U.S.C. § 1292(b)." *Ibid.* Nothing in the Restatement supports petitioner's argument that a court, by deferring an issue for future resolution, has thereby rendered an appealable judgment.

those two points in time. But petitioner's notice of appeal was filed before the decision he wishes to appeal, not after.

Second, Rule 4(b)(2) does not contemplate compound judgments that span multiple court orders. Rather, the rule refers to "*the* judgment," which is a judgment that reflects "*a* decision, sentence, or order" sought to be appealed. In petitioner's case, the decision at issue is the district court's decision to impose $4500 in restitution, which was reflected only in the amended judgment that was entered in September, not the original judgment that was entered in June.

Third, petitioner's argument treats disparate decisions and judgments as interchangeable: He relies on a notice of appeal from the original sentencing decision (which did not include restitution) to stand in for an appeal of the amended judgment (which did). That is the only way petitioner can argue that his notice of appeal was filed after announcement of "a decision" but before "the judgment." But Rule 4(b)(2) does not allow a litigant to treat distinct orders as equivalent in that fashion. The "decision, sentence, or order" that precedes the notice of appeal must be reflected in *the same* "judgment" sought to be appealed. Petitioner thus cannot make his case fit within the rule's text.

3. A neighboring Federal Rule of Appellate Procedure confirms that Rule 4(b)(2) does not apply to the circumstances of this case.

Rule 4(b)(3) lists three post-trial motions: a motion for (i) judgment of acquittal, (ii) a new trial, or (iii) arrest of judgment. Fed. R. App. P. 4(b)(3)(A). Those are sometimes called "tolling motions" because, when a litigant timely files such a motion, it "suspends the running of the time to appeal" a conviction.

Wright & Miller § 3950.10 & n.2 (2008). Rule 4(b)(3)(C) addresses the effect of a tolling motion on the validity of a notice of appeal. The relevant scenario involves a criminal defendant who is convicted; files a notice of appeal; and then files one of the three tolling motions, which is ultimately denied. In that scenario, even though the notice of appeal comes before the tolling motion is filed or resolved, the rule allows the notice of appeal to apply both to the conviction and to denial of the motion:

> A valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

Fed. R. App. P. 4(b)(3)(C). The rule thus specifies that, for a limited category of motions, a notice of appeal is effective "without amendment" as a means of appealing from a later-issued order disposing of those motions. The clear implication is that similar latitude is *not* allowed for other types of orders, such as a post-judgment order setting the amount of restitution.

Petitioner denies the relevance of Rule 4(b)(3)(C), asserting (Br. 28) that "[i]t does not mention or include amended judgments, or sentences, but rather addresses freestanding orders that are also appealable apart from the final judgment." Petitioner is wrong to suggest that the post-judgment *denial* of a tolling motion is more "freestanding" than the post-judgment *award* of restitution. Cf. *Dolan*, 560 U.S. at 618 ("[Section] 3664(*o*) provides that a 'sentence that imposes an order of restitution,' such as the later restitution order here, 'is a final judgment.'"). More fundamentally, petitioner misses the point of Rule 4(b)(3)(C), which is not about finality but about the effect of a notice of appeal. Normally, a notice of

appeal applies only to the orders and judgments that precede it. See pp. 10-11, *supra*. Rule 4(b)(3)(C) creates a limited exception for the three post-judgment tolling motions, deeming an earlier-filed notice "effective" to challenge their denial. But no similar rule relieves a defendant in a deferred-restitution scenario of the need to file a new notice of appeal if he wishes to obtain appellate review of a restitution order. In the absence of such an exception, the normal principle prevails: A new notice of appeal is required.[3]

4. Beyond the plain text of Rule 4(b)(2), the underlying logic of the relevant rules counsels against permitting a criminal defendant to challenge an order of restitution on appeal if he has failed to notice an appeal from that order.

a. Petitioner's reading of Rule 4(b)(2) would create practical and conceptual difficulties when a substantial delay occurs between the initial sentencing and the award of restitution. Although the MVRA requires district courts to determine the victims' losses within 90 days after sentencing, see 18 U.S.C. 3664(d)(5), this Court's ruling in *Dolan* means that courts retain the power to award restitution beyond that timeline.

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[3] Petitioner points (Br. 27-28) to Rule 4(a)(4), which addresses the effect of certain post-judgment tolling motions in civil cases. That rule largely mirrors the wording and operation of Rule 4(b)(3), albeit with some differences. For instance, whereas a notice of appeal is effective "without amendment" in the criminal context, Fed. R. App. P. 4(b)(3)(C), "an amended notice of appeal" is required in the civil context, Fed. R. App. P. 4(a)(4)(B)(ii), although the deadline for appeal is altered, *ibid.*, and the usual docketing fee is waived, Fed. R. App. P. 4(a)(4)(B)(iii). Thus, in both the civil and criminal context, special rules have been devised to deal with appeals from certain post-judgment orders—but no special rule applies to a post-judgment order imposing restitution.

Moreover, a "victim [who] subsequently discovers further losses" has 60 days to petition the court for an amended restitution order. *Ibid.* Accordingly, courts have awarded restitution several months—and sometimes several years—after sentencing.[4] The median resolution time for a federal criminal appeal is now approximately 8.5 months after the notice of appeal is

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[4] The United States has identified seventeen cases, decided since *Dolan*, involving a delay of more than one year between sentencing and the award of restitution. The longest intervals exceeded five years. See *United States* v. *Termini*, No. 10-cr-5, 2016 WL 199398, at *1 (D. Conn. Jan. 15, 2016) (more than five years), appeal filed, No. 16-261 (Jan. 27, 2016); *United States* v. *Henderson*, No. 07-cr-80(1), 2014 WL 347042, at *1-*2 (S.D. Ohio Jan. 30, 2014) (more than five years); *United States* v. *Bell*, 514 Fed. Appx. 423, 424 (5th Cir. 2013) (per curiam) ("about three years after the expiration of the 90-day period"); *United States* v. *Rodriguez*, 751 F.3d 1244, 1250-1251 (11th Cir.) (more than two years), cert. denied, 135 S. Ct. 310 (2014); *United States* v. *Pinto*, No. 12-cr-101, 2016 WL 308771, at *1 (D. Conn. Jan. 25, 2016) (more than two years); *Gilbert*, 807 F.3d at 1198 (twenty-two months); *United States* v. *Chipps*, No. 11-cr-50067, 2013 WL 4852254, at *1 (D.S.D. 2013) (twenty months); *United States* v. *Bourgeois*, No. 10-cr-025, 2013 WL 1953312, at *1 (D. Minn. May 10, 2013) (eighteen months); *United States* v. *Gushlak*, 728 F.3d 184, 188 (2d Cir. 2013) ("Nearly eighteen months"), cert. denied, 134 S. Ct. 1528 (2014); *United States* v. *Hymas*, 584 Fed. Appx. 361, 361 (9th Cir. 2014) ("Over 521 days later"); *United States* v. *Souffrant*, 517 Fed. Appx. 803, 806 (11th Cir. 2013) (per curiam) (sixteen months); *United States* v. *Qurashi*, 634 F.3d 699, 701 (2d Cir. 2011) (fourteen months); *United States* v. *Williams*, 946 F. Supp. 2d 112, 113-114 (D.D.C. 2013) (thirteen months), appeal filed, No. 13-3058 (June 21, 2013); *United States* v. *Michelson*, No. 09-cr-748-01, 2012 WL 1079626, at *1 (D.N.J. Mar. 30, 2012) (thirteen months), aff'd, 505 Fed. Appx. 156 (3d Cir. 2012); *United States* v. *Adejumo*, 777 F.3d 1017, 1018 (8th Cir. 2015) (twelve months); *United States* v. *Ottaviano*, 738 F.3d 586, 594 (3d Cir. 2013) (twelve months), cert. denied, 134 S. Ct. 1922 (2014).

filed. See Administrative Office of the U.S. Courts, *U.S. Courts of Appeals—Median Time Intervals in Months for Cases Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2015*, Table B-4 (2015).[5] Thus, in a deferred-restitution case involving a long delay, if either party files a notice of appeal only from the initial sentencing decision, that appeal might well be resolved by the time restitution is ultimately ordered in the district court.

Under petitioner's reading of Rule 4(b)(2), in which a second notice of appeal is not required to challenge restitution, it is unclear what would or should happen next. Is the order of restitution automatically on appeal, even though the appeal from the original judgment has already been resolved? See Pet. Br. 36 (notice of appeal "ripen[s] automatically under Rule 4(b)(2) to include the amended judgment"). What if the defendant does not wish to appeal restitution?

The practical mechanics of the second appeal would also be uncertain, because a notice of appeal is the triggering event for many aspects of the appellate process. For instance, if a second notice of appeal is not filed, when, if ever, will the new appeal be docketed? See Fed. R. App. P. 12(a) (appellate docketing occurs "[u]pon receiving the copy of the notice of appeal and docket entries from the district clerk"). Will the government become aware that the second appeal exists before the defendant's opening appellate brief is filed? See Fed. R. App. P. 3(d)(1) ("The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of rec-

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[5] http://www.uscourts.gov/file/19492/download.

ord"); see also Fed. R. App. P. 12(b) (appealing attorney must file statement of representation "within 14 days after filing the notice [of appeal]").

Under the government's approach, by contrast, the process is straightforward: If either party wishes to challenge a later-issued restitution order, that party must file a notice of appeal, which would lead to a separate appellate proceeding. The normal approach is to consolidate the two appeals and decide them together, see *Dolan*, 560 U.S. at 618, and that approach might not be available if the delay between sentencing and restitution is too substantial. But no conceptual or practical difficulty would exist in adjudicating the restitution appeal.

b. Petitioner's reading of Rule 4(b)(2) might also interfere with the government's opportunity to cross-appeal certain restitution awards. In a criminal case, the government must file a notice of appeal within 30 days of "(i) the entry of the judgment or order being appealed; or (ii) the filing of a notice of appeal by any defendant," whichever occurs later. Fed. R. App. P 4(b)(1)(B). The latter deadline enables the government to consider its appellate options after reviewing both the underlying order and any appeal by the defendant. The deadline might come into play in a deferred-resolution scenario, for instance, if the government believes that a restitution award is too low but nevertheless declines to challenge it on appeal—unless the defendant does so first, in which case the government would consider a cross-appeal.

But if the defendant does not have to file a second notice of appeal, the government may not learn of the defendant's intention to challenge restitution on appeal until the defendant files his appellate brief. By

that point, the government's deadline for filing its own notice of appeal likely will have expired. See Fed. R. App. P. 31(a)(1) (appellant's opening brief is due "within 40 days after the record is filed"); see also J.A. 10 (petitioner's opening brief was filed 90 days after restitution was ordered). Although cross-appeals from restitution orders are not common, no reason exists to construe the Federal Rules so as to hinder the government's decision whether to pursue one. See *Greenlaw*, 554 U.S. at 246 ("Congress [has] entrusted to named high-ranking officials within the Department of Justice responsibility for determining whether the Government, on behalf of the public, should seek a sentence higher than the one imposed."). Petitioner's reading of Rule 4(b)(2) would have that effect in at least some circumstances.[6]

c. Petitioner offers two practical reasons to adopt his interpretation of Rule 4(b)(2), neither of which is persuasive.

First, he notes (Br. 30) that the government's approach would require a "second notice of appeal and a costly duplicate filing fee," though he acknowledges (*ibid.*) that "the filing fee is waived" for indigent

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[6] For the same reasons, petitioner's approach could deprive a criminal defendant of the opportunity to cross-appeal a restitution award in some deferred-restitution cases. If the government has appealed the initial sentence, but does not file a second notice of appeal following a later-issued restitution award, the defendant may not learn of the government's intention to challenge restitution until the defendant's deadline for filing a cross-appeal has lapsed. See Fed. R. App. P. 4(b)(1)(A)(ii) (defendant must cross-appeal within 14 days after government's notice of appeal). That scenario will presumably occur less frequently, but the possibility that it could happen underscores the incongruity of petitioner's approach.

defendants like himself. He further argues (Br. 30-31) that a second notice of appeal would require taking some procedural steps twice, including transmittal of the notice to the court of appeals and docketing of the appeal, a duplicative process that he calls "impractical and cumbersome."

But much of "modern appellate practice," which the filing of a notice of appeal automatically sets in motion, relies on "electronic filing and dockets," Pet. Br. 14, thus limiting any administrative burdens from the second appeal. And when two appeals arise out of the same criminal case, typically the courts of appeals have "consolidated the two appeals and decided them together." *Dolan*, 560 U.S. at 618. Indeed, petitioner himself asserts (Br. 37) that "post-*Dolan* restitution appeals have been uniformly decided by a single panel of appellate judges in a single opinion, without prejudice to any party." He offers (Br. 37 n.7) a list of citations, which includes appeals from circuits (including the Eleventh Circuit) that require a second notice of appeal in a deferred-restitution case. Accordingly, experience does not suggest that the government's reading of Rule 4(b)(2) would be unduly burdensome or wasteful.

Second, petitioner argues (Br. 31-32) that the government's approach would create a "notice trap" because the Federal Rules of Appellate Procedure are "silent" about whether a second notice of appeal is required. Yet the Rules are not silent: They clearly indicate—as does Section 3742—that a notice of appeal must be filed after the sentence intended to be appealed. See pp. 10-11, *supra*. And if the Court confirms that reading through its decision in this case, it will eliminate any lingering uncertainty. Doing so

will not create a "trap"; it will simply conform to the intuitive principle that a litigant must file a new notice of appeal in order to challenge a new court order.[7]

C. Petitioner's Failure To File A Notice Of Appeal Cannot Be Excused As Harmless Error Under Federal Rule Of Criminal Procedure 52(a)

Petitioner argues, in the alternative, that the lack of a notice of appeal was merely a procedural "error" that may be excused as harmless under Federal Rule of Criminal Procedure 52(a). But petitioner's *own* failure to appeal the district court's award of restitution was not an "error" in the proceedings. Rather, petitioner simply did not satisfy a prerequisite that was necessary to confer jurisdiction on the court of appeals to review the award. At a minimum, the notice of appeal requirement is a mandatory claim-processing rule that must be given effect where—as here—it is invoked by the other side.

1. "'Federal courts are courts of limited jurisdiction,' possessing 'only that power authorized by Constitution and statute.'" *Gunn* v. *Minton*, 133 S. Ct. 1059, 1064 (2013) (quoting *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). Congress may set limits, not only as to the class of cases over

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[7] Under Federal Rule of Criminal Procedure 32(j)(1)(B), a district court imposing a criminal sentence must advise the defendant of his right to appeal. That requirement will normally suffice, in a deferred-restitution case, to provide the defendant with "a clear opportunity to announce his intention to appeal" any award of restitution, and to do so "well before the 10-day filing period runs." *Peguero* v. *United States*, 526 U.S. 23, 27 (1999). In this case, the district court failed to advise petitioner of his right to appeal the restitution award, but there is no dispute that petitioner nevertheless "was aware of his right to appeal." *Id.* at 24.

which federal courts have jurisdiction, but also as to "when, and under what conditions, federal courts can hear them." *Bowles* v. *Russell*, 551 U.S. 205, 213 (2007). When a would-be appellant fails to satisfy a jurisdictional prerequisite to appellate review, therefore, "the Court of Appeals ha[s] no jurisdiction * * * to pass on the merits of" his appeal. *Abney*, 431 U.S. at 663. The requirement that an appealing defendant "file a notice of appeal," 18 U.S.C. 3742(a), is such a jurisdictional prerequisite. See *Griggs*, 459 U.S. at 58.

The jurisdictional nature of Section 3742(a) was squarely at issue in *Ruiz*. There, the Court felt compelled, before considering the merits of a criminal defendant's appeal, to confront "a question of statutory jurisdiction [that] potentially blocks our consideration." 536 U.S. at 626. That question was whether the defendant's argument fell within the class of sentencing errors, delineated by Section 3742(a), as to which a "defendant may file a notice of appeal." *Id.* at 627 (quoting 18 U.S.C. 3742(a)). After examining the defendant's arguments, the Court concluded that he had, in fact, invoked a ground for appeal that was covered by Section 3742(a); as a result, "appellate jurisdiction was proper." *Id.* at 628. *Ruiz* thus confirms that a defendant's appeal must comply with Section 3742(a) in order to fall within the "limited appellate jurisdiction to review federal sentences" created by that provision. *Koon*, 518 U.S. at 96.

The holding of *Ruiz* is consistent with a long line of decisions in which "[t]he filing of a notice of appeal," when required by statute, has been treated as "an event of jurisdictional significance." *Griggs*, 459 U.S. at 58. For instance, *Torres* addressed whether the court of appeals had "jurisdiction" to consider the

claims of a party who had been a plaintiff in the district court, but whose name did not appear on the notice of appeal. 487 U.S. at 313. This Court held that appellate jurisdiction did not exist, because "[t]he failure to name a party in a notice of appeal is more than excusable informality; it constitutes a failure of that party to appeal." *Id.* at 314 (internal quotation marks omitted); see *id.* at 317 n.3 (petitioner "fail[ed] to clear a jurisdictional hurdle"). Other decisions have similarly treated the statutory requirement of a valid notice of appeal as being "jurisdictional in nature." *Smith* v. *Barry*, 502 U.S. 244, 248 (1992); see *Bowles*, 551 U.S. at 213 ("Bowles' failure to file his notice of appeal in accordance with the statute therefore deprived the Court of Appeals of jurisdiction."); *Marrese* v. *American Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985); *Griggs*, 459 U.S. at 61 ("[I]f no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act.").[8]

In sum, compliance with Section 3742(a) is a jurisdictional prerequisite to obtaining appellate review of a criminal sentence. And, as noted above, a defendant who wishes to satisfy Section 3742(a) must "file a notice of appeal." See pp. 8-9, *supra*. Therefore, because petitioner did not file a notice of appeal challenging the district court's award of restitution, the

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[8] The Federal Rules are consistent with that understanding. Federal Rule of Appellate Procedure 4(b)(5) provides that "[t]he filing of a notice of appeal * * * does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a)." The obvious implication is that, for other purposes, the notice of appeal *does* divest a district court of jurisdiction, and it transfers that jurisdiction to the court of appeals.

court of appeals never acquired jurisdiction over that aspect of his case.

2. Even if the Court concludes that filing a notice of appeal is not a jurisdictional prerequisite for appellate review, however, that "does not mean that it is not mandatory or that a timely objection can be ignored." *Gonzalez* v. *Thaler*, 132 S. Ct. 641, 651 (2012). At a minimum, the notice of appeal requirement is a mandatory claim-processing rule that must be enforced where, as here, it is properly invoked. Claim-processing rules "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson* v. *Shinseki*, 562 U.S. 428, 435 (2011). Such rules may be forfeited "if the party asserting the rule waits too long to raise the point," but they are "unalterable on a party's application." *Eberhart* v. *United States*, 546 U.S. 12, 15 (2005) (per curiam) (quoting *Kontrick* v. *Ryan*, 540 U.S. 443, 456 (2004)).

In this case, the government unquestionably timely invoked the notice of appeal requirement. In the court of appeals, petitioner's opening brief signaled for the first time his intention to challenge the amount of restitution. In response, the government argued that petitioner "waived his right to appeal the district court's order of restitution by failing to file a notice of appeal from that order." Gov't C.A. Br. 22 (capitalization omitted); see *id.* at 22-25. In light of that objection, "the court's duty to dismiss the appeal was mandatory." *Eberhart*, 546 U.S. at 18; see *id.* at 19 ("[C]laim-processing rules thus assure relief to a party properly raising them.").[9]

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[9] The Federal Rules of Appellate Procedure themselves underscore the mandatory nature of the notice of appeal requirement.

3. Petitioner argues (Br. 32-41) that his failure to file a notice appeal was merely an "irregularity" in the proceedings that must be excused under Federal Rule of Criminal Procedure 52(a) unless the government can prove prejudice. Rule 52(a) provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." The rule was designed to prevent courts of appeals from reversing convictions on the basis of errors in the district court record that had no effect on the outcome. See *Kotteakos* v. *United States*, 328 U.S. 750, 758-760 (1946) (describing adoption of the "harmless error" statute on which Rule 52(a) was based). "When the defendant has made a timely objection to an error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record—a so-called 'harmless error' inquiry—to determine whether the error was prejudicial." *United States* v. *Olano*, 507 U.S. 725, 734 (1993).

Rule 52(a) does not apply here, because petitioner's failure to appeal from the restitution award was not an "error, defect, irregularity, or variance" in the district court record. The decision whether to appeal an adverse judgment rests entirely with the litigating parties. See *Greenlaw*, 554 U.S. at 243-244. When a party does not appeal, it cannot be said that an "error" has occurred within the meaning of Rule 52.

Rule 4(b)(4) allows a district court to "extend the time to file a notice of appeal for a period not to exceed 30 days," but only "[u]pon a finding of excusable neglect or good cause." And Rule 26(b)(1) specifies that a court "may not" otherwise extend a notice of appeal deadline even "[f]or good cause." If a party's delay in filing a notice of appeal cannot be excused after 30 days even for good cause, it follows *a fortiori* that a party's failure to file *any* notice of appeal cannot be excused.

See *Olano*, 507 U.S. at 733-734 (error occurs "[i]f a legal rule was violated during the district court proceedings") (discussing Rule 52(b)). The party has simply failed to take a step necessary to subject the district court's judgment to appellate review.

The type of errors to which Rule 52 applies was recently explained in *Musacchio* v. *United States*, 136 S. Ct. 709 (2016). There, a criminal defendant acknowledged that he had failed to raise a statute-of-limitations defense at or before trial, but he argued that the court of appeals was nevertheless authorized under Rule 52(b) to evaluate the defense under "plain error" review. This Court rejected that argument, explaining that when a party fails to take the steps necessary to advance his claims, no "error" within the meaning of Rule 52(b) has occurred:

> When a defendant fails to press a limitations defense, the defense does not become part of the case and the Government does not otherwise have the burden of proving that it filed a timely indictment. When a defendant does not press the defense, then, there is no error for an appellate court to correct—and certainly no plain error.

Id. at 718. The same reasoning applies to petitioner's "harmless error" argument. Because petitioner failed to appeal the district court's award of restitution, the amount of restitution was not at issue on appeal, and there was no error—harmless or otherwise—for the court of appeals to correct. Indeed, because the notice of appeal requirement is mandatory, had the court of appeals nevertheless excused petitioner's failure to appeal, the court would have *introduced* error into the proceedings.

Petitioner's argument also has troubling implications. If petitioner were correct (Br. 33) that a litigant's own failure to follow a mandatory claim-processing rule must "be disregarded unless substantial rights are affected," then such rules would cease to be mandatory in any practical sense. The Federal Rules impose numerous filing deadlines, for instance, and in most cases it will be difficult for a litigant to show prejudice from the opposing party's violation of a filing deadline. Petitioner all but admits as much, stating that, under his approach, a court of appeals would almost always be required to overlook a party's failure to comply with the notice of appeal requirement. See Pet. Br. 16 ("It is difficult to imagine circumstances in which the government might be substantially prejudiced by the absence of a second notice of appeal."). Yet this Court has repeatedly stated that courts "are not at liberty to ignore" mandatory claim-processing rules that have been properly invoked. *Carlisle* v. *United States*, 517 U.S. 416, 430 (1996); see *Gonzalez*, 132 S. Ct. at 651 ("mandatory"); *Eberhart*, 546 U.S. at 19 ("assure relief to a party properly raising them"); *Kontrick*, 540 U.S. at 456 ("unalterable").

4. Finally, petitioner argues (Br. 33-35) that his failure to file a notice of appeal must be "disregarded" under *Lemke*. As noted above, see pp. 17-18, *supra*, *Lemke* involved a criminal defendant who filed a notice of appeal after the district court announced his sentence but before the judgment had been entered on the docket. The court of appeals dismissed his appeal as premature. 346 U.S. at 326. In a one-page summary order, this Court reversed, holding that "the irregularity [wa]s governed by Rule 52(a)." *Ibid.*

Lemke does not support petitioner's argument that his failure file a notice of appeal must be forgiven as harmless error. In that case, the government did not object to the premature notice of appeal; rather, the court of appeals had dismissed the case *sua sponte*. See Pet. at 3, *Lemke*, *supra* (No. 109) ("No motion to dismiss the appeal was served or filed by the United States Attorney"). Although this Court characterized the defendant's premature notice of appeal as an "irregularity" governed by Rule 52(a), in modern terminology it would more accurately be described as the violation of a claim-processing rule that, "even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point." *Kontrick*, 540 U.S. at 456; see *id.* at 456-460 (finding that a litigant had forfeited reliance on the time limits established by the Federal Rules of Bankruptcy Procedure). Here, by contrast, the notice of appeal requirement—in addition to being a jurisdictional prerequisite to appellate review—was properly invoked by the government.

In any event, this Court's more-recent decisions squarely reject the notion that a litigant's failure to file a valid notice of appeal may be excused absent prejudice to the other party. In *United States* v. *Robinson*, 361 U.S. 220 (1960), the Court strictly enforced the time limitation for filing a notice of appeal in a criminal case, concluding that the period could not be extended "regardless of excuse." *Id.* at 229. Similarly, in *Griggs*, the Court rejected an argument that a notice of appeal, deemed "premature" by a then-applicable Federal Rule of Appellate Procedure, could nevertheless be given effect "unless the appellee can show prejudice resulting from the premature filing of

the notice." 459 U.S. at 57 (citations omitted). And in *Torres*, the Court rejected the argument that "failure to name a party in a notice of appeal" was an "excusable informality" that could be forgiven as "harmless error." 487 U.S. at 314, 317 n.3. The same result is appropriate here.[10]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ALLON KEDEM
Assistant to the Solicitor General
SANGITA K. RAO
Attorney

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[10] The requirements at issue in *Robinson*, *Griggs*, and *Torres* were described by the Court as "jurisdictional." See *Robinson*, 361 U.S. at 224; *Griggs*, 459 U.S. at 58-59; *Torres*, 487 U.S. at 314-317. If rendered today, those decisions would most likely characterize the relevant rules in different terms. See *Eberhart*, 546 U.S. at 18. But any "imprecision" in terminology should not be allowed to "obscure[ ] the central point" of those cases: "that when the Government object[s]" to the opposing party's failure to file a proper notice of appeal, "the court's duty to dismiss the appeal [i]s mandatory." *Ibid.*

APPENDIX

1. 18 U.S.C. 3664 provides in pertinent part:

Procedure for issuance and enforcement of order of restitution

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d)(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified

victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—

(A) provide notice to all identified victims of—

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents,

and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of

demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

* * * * *

(*o*) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that—

(1) such a sentence can subsequently be—

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

(B) appealed and modified under section 3742;

(C) amended under subsection (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.

* * * * *

2. 18 U.S.C. 3742 provides in pertinent part:

Review of a sentence

(a) APPEAL BY A DEFENDANT.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11)[1] than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) APPEAL BY THE GOVERNMENT.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sen-

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[1] See References in Text note below.

tence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11)[1] than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

* * * * *

3. Fed. R. App. P 3 provides:

Appeal as of Right—How Taken

(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only

for the court of appeals to act as it considers appropriate, including dismissing the appeal.

(3) An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment.

(4) An appeal by permission under 28 U.S.C. § 1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively.

(b) Joint or Consolidated Appeals.

(1) When two or more parties are entitled to appeal from a district-court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals.

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment, order, or part thereof being appealed; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

(5) Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record—excluding the appellant's —or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing. Service is sufficient despite the death of a party or the party's counsel.

(e) **Payment of Fees.** Upon filing a notice of appeal, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the court of appeals.

4. Fed. R. App. P. 4 provides:

Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) **Filing Before Entry of Judgment.** A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) **Multiple Appeals.** If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after

the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) **Entry Defined.**

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a) does not affect the validity of an appeal from that judgment or order.

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 14 days after the entry of the order disposing of the last such remaining motion, or within 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 14 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order—but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)—becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) **Motion for Extension of Time.** Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) **Jurisdiction.** The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the

motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) Entry Defined. A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is

mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

4. Fed. R. Crim. P. 52 provides:

Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.